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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	
Future Development of SMR Systems	)	
in the 800 MHz Frequency Band	)	

To: The Commission

COMMENTS OF RADIOFONE, INC.

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SUMMARY

The Notice of Proposed Rule Making (NPRM) in the captioned docket proposes establishment of a new type of specialized mobile radio (SMR) service called Expanded Mobile Service Provider (EMSP). The proposed EMSP service would have many cellular-like characteristics, including allocation of large blocks of spectrum, spectrum re-use over wide areas (in the form of cells), seamless wide-area roaming, relatively uniform service areas corresponding to cellular's Metropolitan

entrepreneurs and tailored to the individual needs of industrial users. By licensing a private radio cellular system, the Commission would contradict SMR and cellular spectrum allocation policies previously upheld on appeal.

The Commission also fails to implement adequate consumer protections. By licensing cellular SMR as a private radio service, the FCC would remove the new service from state regulatory oversight, forcing consumers to complain directly to the Commission about service problems. However, the Commission's enforcement resources are woefully inadequate to respond to such consumer complaints.

The proposed action contradicts Congressional intent to establish a dual regulatory structure. By establishing what is essentially a common carrier service within the regulatory framework of private radio, the Commission breaks down the regulatory construct of common carriage. The proposed action would violate Congressional intent demonstrated in Section 332 of the Communications Act of 1934, 47 U.S.C. § 332, that there be viable and effective common carrier regulation of mobile services. Establishment of EMSP would remove a common carrier service from state regulation, and would accomplish what Congress warned against, i.e., use licensing powers to circumvent jurisdictional limitations.

Finally, the proposal to eliminate mobile loading requirements would only exacerbate already rampant private radio frequency warehousing. Present rules make it more

profitable, in many instances, for private radio licensees to amass an inventory of frequencies to be sold later at a profit, than to use the frequencies to provide radio service. Elimination of mobile loading standards would accelerate this trend.

Before the
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In the Matter of	)	
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Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144

To: The Commission

COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. (Radiofone), by its attorney and pursuant to Section 1.405(b) of the Commission's Rules, 47 C.F.R. § 1.405(b) (1992), submits its Comments in opposition to the amendments to Part 90 of the Commission's Rules proposed by the Notice of Proposed Rule Making (NPRM) in the captioned proceeding.

I. STATEMENT OF INTEREST OF RADIOFONE

Radiofone is licensed by the Commission to provide cellular service in the New Orleans, Louisiana MSA; Louisiana 9 - Plaquemines RSA; Michigan 5 - Manistee RSA; Washington 3 - Ferry RSA; and Abilene, Texas MSA. Radiofone also holds interests in various other cellular systems. As demonstrated herein, the actions proposed in the captioned proceeding would result in the creation of a private carrier cellular service, which likely would compete directly with Radiofone's existing

common carrier cellular systems. Thus, Radiofone would be adversely affected in a direct and tangible way.

II. THE PROPOSED ACTION WOULD ESTABLISH A PRIVATE CELLULAR SERVICE, THEREBY FUNDAMENTALLY CHANGING THE NATURE OF EXISTING SPECIALIZED MOBILE RADIO.

Proposed action would create a new type of SMR, called Expanded Mobile Service Provider service (EMSP). However, as demonstrated below, the proposed EMSP is designed to function like cellular, and will be marketed to the public as cellular. Regardless of the name attached, implementation of the NPRM would, in fact, create a private cellular service.

Proposed EMSP is designed to function like cellular, since it would allocate large blocks of spectrum, allow spectrum re-use over wide areas (in the form of cells), encourage seamless wide-area roaming, establish relatively uniform market sizes roughly corresponding to cellular's

system performing a "hand-off" between cells. The NPRM explicitly targets cellular's "seamless wide-area roaming" as a goal for private radio EMSP. (NPRM at ¶ 8). Similarly, the NPRM proposes to establish SMR license markets corresponding to the 47 Rand-McNally Major Trading Areas (MTAs) or, in the alternative, each of the 487 Rand-McNally Basic Trading Areas (BTAs). In this regard, the proposal eliminates the current SMR feature of allowing the individual SMR licensee to create its own service area corresponding to the individualized needs of, and service arrangements made with, its customers. Instead, EMSPs will be licensed to serve a particular region, like cellular carriers.

If implemented, these proposals would result in the repackaging and remarketing of private radio SMR service into cellular service. From nearly every conceivable perspective, except one, private radio SMR service would become cellular service. As noted below, the only difference would be regulatory treatment of the two services. Thus, functional distinctions between common carrier and private radio will have disappeared, eventually resulting in elimination of common carriage as a regulatory construct. As demonstrated below, creation of two cellular services, one common carrier and one private, would contradict the FCC's longstanding spectrum allocation policy.

In 1975, the Commission allocated frequency spectrum in the 806-947 MHz band for the creation of two new land mobile

radio services, namely cellular and specialized mobile radio (SMR) service. The Commission established a reasoned policy in creating these two distinct land mobile radio services. It is respectfully submitted that the actions proposed in the captioned proceeding would depart from this policy in a way that would not serve the public interest.

When SMR and cellular service were established in Docket No. 18262[1], the Commission envisioned two distinctly separate services. The Commission chose to depart from its then-existing allocation policy of granting blocks of spectrum according to user categories or services. Rather, the Commission based allocation upon system type. With this in mind, "the allocation problem becomes a matter of defining the systems to be accommodated. . .." 46 F.C.C. 2d 752, 755 (1974).

Thus, the two land mobile radio services were established: the cellular system proposed by both Bell [redacted]

among relatively small geographic cells. The Commission contemplated that this technology would allow high frequency re-use, and make possible the extension of the public switched telephone network to an infinite number of potential mobile telephone users. 46 F.C.C. 2d at 753. By contrast, the second configuration was similar in concept to the community repeaters employed in private dispatch services except that users would have access to a number of channels rather than just one. While both services trunked together frequencies, only cellular would re-use dozens of channels through cells dispersed over a wider geographic area to extend interconnected telephone-type service. 46 F.C.C. 2d at 754. SMR was limited to one system per licensee every 40 miles; and while interconnected service was possible as an adjunct to the primary dispatch function, it was subject to the interconnection restrictions of Section 332(c) of the Communications Act of 1934, as amended (the Act).

Not only were the two land mobile radio services operationally distinct but they also targeted different groups of subscribers, as recognized by the U.S. Court of Appeals for the District of Columbia Circuit in upholding the allocations. "The cellular system is clearly a public, common carrier system, and will serve primarily to expand the capacity of radiotelephone service." National Association of Regulatory Utility Commissioners v. F.C.C., 525 F.2d 630, 634 (D.C. Cir. 1976) (NARUC) (emphasis added). Service to individuals as

well as business users was clearly contemplated. By contrast,

> "private services. . . . are predominantly dispatch services such as those operated by police departments, fire departments and taxicab companies for their own limited purposes. However, they are not limited to services which an operator provides only to itself, but also extend the services provided to a limited group of users by third party operators." Id (emphasis added). See also, Memorandum Opinion and Order, 51 FCC 2d 945, 954 (1975).

In addition to having completely different engineering configurations, and targeted base of subscribers/users, the two land mobile radio services also received different regulatory treatment. Cellular, which "is clearly a public common carrier system," id, was licensed as a common carrier service subject to the reasonable rate, non-discrimination and other restrictions of Title II of the Act, as well as state economic regulation. By contrast, the private SMR service was licensed as a non-common carrier service, and state regulation was preempted. "The non-common carrier classification was the pivot upon which the Commission's scheme for regulating SMRs turned." NARUC, supra, 525 F.2d at 640. Thus, in allocating the spectrum to these land mobile services, the Commission implemented two completely different type services, different in their targeted subscriber/user base, different in the permissible engineering configurations, and with completely different regulatory frameworks.

In sharp contrast to the Commission's original intention, actions proposed in the above-captioned docket would make a

hybrid radio service, "private cellular" (or perhaps "cellular SMR"), which is more like common carrier cellular than it is like the original specialized mobile radio. As a result of a series of regulatory decisions made since 1975, and the instant proposed actions, the two major land mobile services -- cellular and SMR -- would become virtually indistinguishable. They would employ similar engineering configurations (both featuring high frequency reuse utilizing many channels), and both would target as subscribers those users that now make up the cellular market. In previous dockets, the Commission stripped away crucial differences between SMR and cellular by eliminating eligibility requirements for SMR, and by allowing relatively unfettered SMR interconnection to the public switched telephone network. However, SMR has not been able to compete directly with cellular due to the advantages currently awarded to cellular systems. Actions proposed in this docket would eliminate even those advantages.

As a result, the new cellular SMR operators could advertise service that is "just like cellular". The consumer would not be able to distinguish between the private cellular-type SMR service, and the common carrier cellular service.

of cellular telephone service - would be better accomplished through a cellular rulemaking.

III. BY LICENSING THREE SIMILAR SERVICES -- CELLULAR, CELLULAR SMR AND PCS -- THE COMMISSION IS SETTING UP AN EVENTUAL SHAKEOUT IN THE PERSONAL RADIO COMMUNICATIONS MARKET, WHEREBY SOME LICENSED OPERATIONS ARE VIRTUALLY CERTAIN TO FAIL.

The Commission is setting loose market forces which will virtually ensure that at least some large licensed systems will cease operation; and many (if not most) will be unable to achieve the financial viability needed to upgrade services, and introduce innovations into the marketplace. By flooding the market for personal radio communications with new offerings, the Commission is not serving the public interest and is not ensuring an orderly management of the radio spectrum. Within a short period of time, the Commission will have authorized four similar and competing personal radio services: PCS, cellular, cellular SMR in the 900 MHz band (PR Docket No. 89-553), and cellular SMR in the 800 MHz band (the instant docket). The Commission already has found that PCS will directly compete with cellular. Since cellular and PCS will compete, the Commission is considering proposals which, if adopted, could prohibit existing cellular operators from applying for PCS licenses. See Notice of Inquiry, General Docket No. 90-314, 5 FCC Rcd 3995, 3999 (1990). As described above, the proposed cellular SMR service would likewise compete directly with cellular.

Against this backdrop of impending competing service offerings, it should be noted that the cellular industry is hardly on a solid financial footing, and cannot yet accommodate competition, particularly unregulated competition. The construction of a cellular system requires millions (and in some cases, hundreds of millions) of dollars. Some existing cellular systems are just now beginning to earn a positive cash flow. Many others still suffer from negative cash flows, and must be funded from borrowing or other operations. Moreover, cellular systems still are heavily leveraged, and have not yet generated capital from ongoing operations sufficient to repay massive initial investment in plant and equipment. The sales prices of cellular systems are computed as multiples of anticipated future earnings; very few cellular properties actually have made any positive earnings. Attachment A hereto shows some of the largest publicly-traded cellular carriers, all of whom are considered to be running large and "successful" systems, but all of which are still operating in the red.[2] Few or none have actually earned a return on investment from continuing operations.

Moreover, another round of cellular financing will be necessary for the anticipated conversion from analog to digital, and for buildout of new cells required by subscriber demand as originally contemplated by the Commission in

[2] The information in Attachment A was obtained from data compiled by the Cellular Telecommunications Industry Association (CTIA).

creating cellular service. The proposed cellular SMR and PCS service offerings threaten the continued expansion and health of the cellular industry, since financing would become less available as lenders grow nervous about an overly competitive market in our nation's still-sluggish economy.

Thus, the Commission is preparing to literally flood the market with personal radio communications service offerings. A predictable result of this overly competitive environment would be an eventual shakeout in the personal radio communications market. Some existing licensed operations are virtually certain to fail, as the marketplace inevitably adjusts to an overhang of supply of radio services. It is respectfully submitted that the Commission acts at variance with its statutory mandate and contrary to the public interest by setting in motion market forces virtually ensuring the financial failure of licensees who have invested millions of dollars and years of developing a valuable service to the public. Certainly, the financial viability of all carriers will be weakened. The creation of such potentially ruinous competition would only serve to waste scarce resources. It would threaten the full development of telecommunications services to the public.

It is not sufficient for the Commission to encourage competition for the sake of competition. Instead, the Commission must find that the public interest calls for increased competition under the particular circumstances

present. See Hawaiian Telephone Company v. F.C.C., 498 F.2d 771 (D.C. Cir. 1974). As described above, additional competition in cellular is inimical to the public interest at this time. The record contains no empirical evidence or factual basis supporting the proposed creation of cellular SMR.

IV. THE PROPOSED ACTION FAILS TO ADEQUATELY PROTECT THE CONSUMER OF PERSONAL RADIO SERVICES

As noted above, the new cellular SMR service would look just like common carrier cellular telephone service to most consumers. Indeed, it is certain to be marketed that way. However, the new cellular SMR will not come with the consumer protections of common carrier cellular, since this is a private radio service which under Section 332 of the Communications Act, 47 U.S.C. § 332, is removed from common carrier regulation. The Commission is inviting consumer abuse by establishing an overly competitive personal radio communications market, without compensating common carrier consumer protections. Such unregulated and overly competitive market conditions invite predatory pricing, "fly by night" operations and otherwise substandard service to the public. Where will the aggrieved customer go to complain about problems with the new cellular SMR service? The Commission lacks the resources and expertise to investigate and resolve consumer complaints about cellular SMR service. Since this is a private radio service, the state public service

commissions could not implement any protections, nor require remedial action.

V. THE PROPOSED ACTION IMPERMISSIBLY PREEMPTS STATE REGULATION BY RECLASSIFYING A COMMON CARRIER SERVICE INTO PRIVATE RADIO.

As noted above, the Commission proposes to remove from the exclusive domain of common carrier cellular important benefits now distinguishing the service from private radio SMR. These benefits at least partially have fulfilled the traditional bargain struck between the sovereign and common carriers: The common carrier agrees to abide by consumer protection regulations not imposed upon other businesses in exchange for certain privileges conferred by the sovereign.

The Commission proposes finally to unhinge the bargain, by expanding these privileges to SMR, while still leaving existing cellular companies subject to the same common carrier requirements. For example, cellular common carriers still would be subject to state service and rate regulation, the nondiscrimination and "reasonable rate" requirements of Title II of the Act, as well as state, and possibly federal tariffing requirements. See AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992). While SMR licensees can pick and choose the prime customers, common carriers must serve all comers. "A common carrier must be held to a very high standard of public service which is even greater than that required of a broadcaster." Microwave Communications, Inc., 18 FCC 2d 953, 973 (1969)

are also subject to annual reporting requirements not imposed on SMRs, and face monetary forfeitures ten times greater than those imposed on SMRs for the same offense. Common carriers

Commission should consider the effect on cellular common carriage wrought by these proposed changes. As demonstrated below, disintegration of common carriage cellular radio violates the letter and intent of the Act, and unlawfully preempts state regulation.

A. The authority delegated by Congress purportedly supporting the proposed action is general, and not specific to the action.

> First, an agency literally has no power to act, let alone pre-empt [state regulation], unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted . . ..

Louisiana Public Service Commission, 476 U.S. 355, 374 (1986). An examination of the nature and scope of delegated authority which may support the proposed action reveals general powers, with no authority granted for the specific action.

Congress articulated general policy goals for allocation and management of spectrum in the Private Land Mobile Services, charging the Commission to "consider" whether its actions will improve spectrum efficiency, reduce regulatory burdens, encourage competition and provide services to the largest feasible number of users. 47 U.S.C. § 332(a). These goals are "consistent with section 1 of [the] Act," id, in that Congress originally delegated authority to the Commission to "make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . .." 47 U.S.C. § 151.

In order to fulfill these policy goals, Congress delegated to the Commission general and broad powers to classify radio stations, prescribe the nature of service to be rendered by each class of station, and assign bands of frequencies to the various classes of stations. 47 U.S.C. § 303.

"However broad these powers may be, they also are very

common carriage. 47 U.S.C. § 332(c)(2). Congress also removed Private Land Mobile Service from state regulation. 47 U.S.C § 332(c)(3). Therefore, by definition, whatever the Commission reclassifies out of common carriage becomes private carriage, and in turn is removed from state regulation.

As a practical matter, the award of contiguous channels, to be assigned in smaller groups to geographic cells; the ability to provide extensive roaming services; and the ability to load very large numbers of mobile units has distinguished cellular from SMR. Even though the Commission has steadily eroded distinctions between common and private carriage through a series of decisions, the proposed action would have drastic destructive effect on the current status of common carriage. By removing the above advantages from the exclusive domain of common carriage, the two services would become virtually indistinguishable.

From a statutory perspective, the proposed action would leave the states little to regulate, since it would strip away the viability of common carriage in intrastate cellular telephone service. States would find themselves regulating an empty shell, since the construct of common carriage could not be distinguished. The states' practical influence over intrastate cellular telephone traffic would diminish, even though they would continue to regulate existing common carrier

incentives. Much of the future growth in cellular likely would be diverted to private radio cellular SMR, due to Commission established regulatory incentives. Therefore, the proposed action would de facto preempt state regulation by inexorably removing from state oversight intrastate cellular telephone traffic. This result would accomplish through the back door what the Court expressly rejected in NARUC v. FCC, No. 86-1205 (D.C. Cir. March 30, 1987) (Per Curiam), wherein the Court of Appeals found that the Commission's proposal to preempt state regulation of common carrier mobile radio operations impermissibly ignored the powers reserved to the states by Section 2(b) of the Act.

C. **The proposed actions must be abandoned, since they would violate Congressional intent that states retain jurisdiction over intrastate telephone traffic.**

States retain statutorily mandated authority to regulate common carrier stations, 47 U.S.C. §§ 2(b), 221(b), and to regulate intrastate cellular telephone traffic. See also 47 U.S.C. 332(c)(3). By breaking down the demarcations between private and common carriage in cellular service, the proposed actions would remove from state regulation radio service Congress intended to be regulated by the states. What presently, and properly is land mobile common carriage would be redefined as private radio service, and removed from state oversight.

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation

supersede state law." Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 369 (1986). Congress did not intend that FCC regulation supersede state regulation of the land mobile radio service demarcated as common carriage. First, as noted above, Congress reaffirmed its support for land mobile common carriage by establishing in the Communications Amendments Act of 1982 a demarcation with private carriage. Second, Congress long has intended that states regulate common carrier stations. See 47 U.S.C. §§ 152(b), 221(b). Third, Congress explicitly reaffirmed its intention that states regulate "common carrier stations in the mobile service." 47 U.S.C. § 332(c)(3). Finally, in passing the Communications Amendments Act, Congress explicitly warned that "the Commission may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over common carrier stations." Conference Report, supra at page 56.

Thus, as the U.S. Court of Appeals for the D.C. Circuit has held, Sections 2(b) and 301 of the Act "divide the jurisdiction over intrastate radio common carriage services between state and federal authorities. States retain authority over the common carriage aspects of such services . . . . " California v. F.C.C., 798 F.2d 1515, 1519 (D.C. Cir. 1986). As noted above, implementation of the proposed actions would leave the states little to regulate since the concept of common carrier cellular would become indistinguishable from

cellular SMR, and the new incentives would channel the cellular market to SMR. The Commission "would thus prepare the way for elimination of any state role in the regulation of intrastate radio common carriage. Yet, such a result would . . . violat[e] the congressional intent to establish a system of dual regulatory control." California v. F.C.C., supra, 798 F.2d at 1519.

There is ample evidence of Congressional intent for continued state regulation of common carrier mobile services. By contrast, the Commission could point to only general, non-specific authorization for its proposed preemption action. It is respectfully submitted that by proposing to establish a new cellular SMR service, the Commission attempts to do what Congress warned against, i.e., use licensing powers to circumvent jurisdictional limitations.

VI. PROPOSED ELIMINATION OF MOBILE LOADING REQUIREMENTS WOULD EXACERBATE ALREADY RAMPANT PRIVATE RADIO FREQUENCY WAREHOUSING

The NPRM proposes to eliminate the traditional SMR mobile loading standard. However, the NPRM does not propose an alternate efficiency standard, and admits that "[n]o commenter has, as yet, proposed a viable alternative measurement of spectrum use." (NPRM at ¶ 37).

Elimination of mobile count requirements for allocating spectrum only adds to the private radio frequency warehousing problem. If implemented, the proposal would strengthen incentives inherent in private radio rules that encourage the

accumulation of spectrum as a business, rather than the provision of radio service. In many instances, it is more profitable for private radio licensees to accumulate